



BOARD OF ETHICS
CITY OF CHICAGO

ADVISORY OPINION

To: The Honorable X Alderman, Ward
 The Honorable Y Alderman, Ward

Date: September 13, 2019

Re: Case No. 19027.A, Practice of Criminal Defense Law by City Elected Officials

Executive Summary

The Board of Ethics has determined that aldermen who are licensed attorneys may not represent (or receive compensation or anything else of value from the representation by another attorney of) persons in criminal cases where there is involvement by Chicago Police Department personnel. More precisely, we have determined that the fiduciary duty provision of the City's Governmental Ethics Ordinance (the "Ethics Ordinance") prohibits City Council members who are licensed attorneys¹ from personally representing or receiving or deriving compensation or anything else of value from the representation by others of persons in traffic or criminal cases in which there is participation by Chicago Police Department ("CPD") personnel, as, for example, arresting officers, executors of search warrants, investigators, witnesses, or custodians of evidence.²

I. Background

On July 17, 2019, before a meeting of the City Council's Committee on Ethics and Government Oversight to consider amendments to Municipal Code Chapters 2-56 and 2-156, Alderman X, an attorney licensed to practice in Illinois, asked our Executive Director whether proposed amendments to §2-156-090(b) would limit his ability to practice criminal defense law, in addition to his aldermanic duties. The Executive Director advised the alderman that he would need to take the matter up through a formal advisory opinion issued by the Board. Then, on July 22, Alderman Y emailed the Executive Director on behalf of Alderman X asking the same question. On July 24, the City Council passed (among others) amendments to §2-156-090(b), "Representation of Other Persons," which take effect on December 17, 2019.

This opinion answers the aldermen's question.

This is a matter of first impression for the Board.

¹ Among elected City officials, five (5) currently serving City Council members have disclosed an outside law practice on their 2019 Statement of Financial Interests: Howard Brookins (21st Ward); Edward Burke (14th Ward); Leslie Hairston (5th Ward); Chris Taliaferro (29th Ward); and Patrick Daley Thompson (11th Ward). Our review of Statements of Financial Interests filed by aldermen since 2013 shows that four (4) other aldermen, only one (1) of whom is still a member of the City Council, disclosed outside law practices as well. None disclose precisely what type of law they practice, as they are not required to. There are other City Council members who are attorneys, but they have not reported an outside law practice.

² Data supplied by the Cook County State's Attorney's Office ("SAO") show that, for 2019 alone, 66.16% of all felony charges, excluding narcotics cases, brought by that office have arisen from criminal occurrences investigated by the CPD, and that 66.87% of all felony charges, excluding narcotics cases, brought by that office have arisen from criminal occurrences in the City of Chicago. The Board draws a reasonable inference that, if narcotics cases are included, the percentages of cases investigated by the CPD and of criminal occurrences occurring in Chicago charged by the SAO would each be higher.

II. Relevant Law

The following Ethics Ordinance sections are relevant to this opinion:

2-156-020 Fiduciary duty. “Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the city.”

2-156-090(b) Representation of Other Persons [as amended, effective December 17, 2019]. “No elected official or employee may represent, or derive income, compensation or other tangible benefit from the representation of, any person in any judicial, quasi-judicial or other proceeding before any administrative agency or court: (i) in which the City is an adverse party; or (ii) that may result in an adverse effect on City revenue, City finances, or the health, safety, welfare or relative tax burden of any City residents.”

Also relevant to our analysis is Rule 1.7 of the Illinois Supreme Court’s Rules of Professional Conduct (the “RPC”) for Illinois attorneys, entitled **Conflict of Interest: Current Clients**.³ It provides:

“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.”

III. Analysis

A. The Ethics Ordinance

The provision of the Ethics Ordinance most relevant to this case is *not* §2-156-090(b) as amended, the one prompting the aldermen’s question. Rather, it is the Ordinance’s fiduciary duty provision. Under existing §2-156-090(b), a violation occurs only where the City is a party and has interests adverse to those of the person represented by the alderman-attorney.⁴ This current prohibition is thus largely irrelevant to the question posed here: criminal complaints are typically brought by State’s Attorneys in the name of the People of Illinois, and the City is rarely a party to such proceedings. However, under this provision as amended, effective December 17, 2019, a violation would occur if the alderman-attorney represents clients even in criminal proceedings where the City is *not* a party but that nonetheless may result in “an adverse effect on the health, safety or welfare of any Chicago residents.”

³ For the full text of the RPC, see http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/default_NEW.asp. The RPC are promulgated, interpreted, and enforced by the Illinois Supreme Court and the Attorney Registration and Disciplinary Commission (“ARDC”), one of its arms. RPC Rule 1.7 became effective January 1, 2010, and has not been amended since.

⁴ For that reason, we advised Alderman [redacted] in Case No. 03027.A that he was prohibited from representing or receiving compensation or income from someone else’s representation of persons in actions against individual CPD officers, *not* by §2-156-090(b), as the City was and is not a party in those actions, but by the fiduciary duty he owes to the City as an elected alderman.

Based on this Board's previous interpretations of the Ordinance's fiduciary duty provision (§2-156-020), we find it unnecessary to address the aldermen's questions under amended §2-156-090(b), given the facts at hand. The Board leaves the application of that provision to another day. Rather, our analysis under the Ordinance's fiduciary duty provision is direct, clear and dispositive (and, as explained in B, below, consistent with relevant state law).

The Board has recognized in numerous cases since 1990 that the fiduciary duty owed to the City by City officials and employees obligates them all, including aldermen, to discharge their public duties in the City's best interests. More pointedly, in a series of advisory opinions since 1990 addressing the outside practice of law by aldermen, we have held that the fiduciary duty *aldermen* owe the City:

"establishes an obligation for aldermen to give, within lawful limits, undivided loyalty to the City of Chicago in the discharge of their public duties. In these public duties, they must be able to exercise professional judgments free from outside influence or conflicting duties to another entity. *This duty is based upon the position of the person as alderman ... and is distinct from the fiduciary duty owed by attorneys to their clients ... City Council members legislate on all areas of City government. Therefore they owe a very broad fiduciary duty to the City.* In addition, because City Council members are elected officials, chosen by the public, they are accountable to the public's trust in a way much more expansive than are members of [City] boards and commissions."⁵ (Emphasis added.)

While the question raised here presents a matter of first impression for the Board, we have applied the fiduciary duty provision in another case where an alderman-attorney wished to represent persons in lawsuits against individual CPD officers, and where, as here, the City was not itself a party to the litigation. In Case No. 03027.A, we considered whether the Ethics Ordinance prohibits an alderman-attorney from representing clients in litigation against individual CPD members arising out of allegations of misconduct by those members while performing their City responsibilities.

We determined that an alderman's fiduciary duty to the City prohibits him or her from personally representing or receiving any income or compensation from the representation by another of clients in such proceedings. We stressed that, even though the City would not be named as an adverse party in such cases, it is obligated by contract (namely, collective bargaining agreements with the various unions representing CPD personnel) to defend against such claims at its own expense and pay from its treasury any judgments or settlement amounts. Moreover, defendant CPD officers could use attorneys from the City's Law Department to defend them if they wished, thereby putting aldermen-attorneys in the conflicting position of having to cross-examine and challenge the conduct of other City employees or officials on behalf of their private clients. And, of course, the City Council approves settlement agreements in such cases, depending on the amount.

We wrote that "an essential feature of fiduciary duty is that it is indivisible – aldermen ... owe 100% of their allegiance to the City and its taxpayers."⁶ We explained⁷ that aldermen are of course not prohibited from engaging in the outside practice of law, but must "avoid taking on legal representations that would compromise their ability to exercise their aldermanic responsibilities free from any outside influences or duties (such as those owed to law clients)." See also Case No. 90035.A, where we determined that aldermen owe a broad fiduciary duty to the City and thus cannot represent City employees in workers' compensation cases against the City, even if the aldermen-attorneys receive no monetary compensation for the work. We wrote that: "[w]hen a City

⁵ See Case Nos. 90035.A, pp. 3-4; 03027.A, p. 4; 18007.A, p. 8. These cases and all Board opinions cited in this opinion, are collected and posted in full text here: https://www.chicago.gov/city/en/depts/ethics/supp_info/fiduciary_duty_-ao121.html.

⁶ Case No. 03027.A, p. 4.

⁷ This Board has, since the Ethics Ordinance was first enacted, issued a series of advisory opinions recognizing that the Ethics Ordinance does not *per se* prohibit aldermen or City employees from practicing law, in addition to their City positions and responsibilities, though of course the Ordinance, historically, and as recently amended, prohibits certain types of representation. See Case Nos. 18007.A, 90035.A, 11045.A, 12049.O, and 15032.O.

Council member, who is a lawyer, represents a client in a Worker's Compensation case against the City, he or she faces an irresolvable conflict between competing fiduciary duties."⁸

Put another way, aldermen cannot fulfill their fiduciary responsibilities to the City if they represent clients in criminal cases where, for example, they may need to aggressively question the credibility or conduct of CPD personnel, or attack the legitimacy of search warrants, arrests, or interrogations on behalf of private clients. If successful (attorneys are expected to zealously advocate for their clients), there may well result negative financial ramifications for the City from improper searches, arrests, or interrogations. At the same time, aldermen are obligated to engage in fair-minded debate and deliberate and vote on CPD matters that come before the City Council, and to represent their constituents on CPD matters in the community -- essential aldermanic roles.

Thus, we conclude that the Ordinance's fiduciary duty provision prohibits aldermen from representing clients in criminal cases (regardless of which agency brings the charges, such as the Cook County State's Attorney or Illinois Attorney General) in which CPD personnel and their work have been involved, as, among other roles, arresting officers, witnesses, executors of search warrants, custodians of evidence, or they otherwise participate in the proceeding or matter.⁹

B. Illinois Law

State law is also relevant to our analysis. Our conclusion under the Ethics Ordinance is consistent with the way Illinois tribunals have applied the ethics rules to which all Illinois attorneys are bound. Illinois law is clear that a sitting alderman who is a licensed attorney has a conflict of interests and thereby would violate RPC 1.7 by accepting an engagement for criminal defense work where police officers employed by the same government entity to which he or she was elected are arresting officers, investigators, or witnesses, or otherwise participate in the arrest or related activities giving rise to the case. The RPC are enacted by the Illinois Supreme Court, and enforced by the ARDC. The Board takes note of these provisions, as they lend insight and guidance for evaluating fiduciary responsibilities of attorneys who are also elected officials.¹⁰

In *In re Samuel J. Cahnman*, Opinion No. 3121596, issued July 11, 2016, and affirmed by the Illinois Supreme Court on November 21, 2016,¹¹ the ARDC's Review Board determined that a Springfield alderman violated the RPC by representing defendants in cases where Springfield Police Department officers made the arrests or would serve as witnesses. The Review Board recommended that the alderman-attorney be suspended from the practice of law for 90 days and the Illinois Supreme Court imposed that sanction. It considered the following question under the RPC: does a sitting alderman who is also a licensed attorney engage in a conflict of interest by representing clients who are defendants in traffic and criminal cases in which his municipality's police officers were the arresting officers?

⁸ Case No. 90035.A, p. 4.

⁹ We have found that only one of our cohort municipal ethics agencies has addressed a similar question. It came to the same conclusion. The New York City Conflict of Interests Board, applying not that state's ethics rules for attorneys, but rather New York City's governmental ethics charter, came to the same determination. See Advisory Opinion No. 2008-5, City of New York Conflicts of Interest Board, December 17, 2008 (attorneys employed by the City may not represent criminal defendants in courts within the City, but criminal defense work outside the City would not be barred so long as these matters "do not require communications with New York City [District Attorneys], NYPD employees, or other City officials"). See https://www1.nyc.gov/assets/coib/downloads/pdf5/aos/2004-2013/AO2008_5.pdf.

¹⁰ This is not the first time we have found it relevant to examine the ethics rules covering Illinois attorneys. In 1990, we issued our advisory opinion in Case 90035.A, applying the Illinois Supreme Court's then recent *In re Vrdolyak* decision. We stated:

"The Board is required to follow the law as set forth by the Illinois Supreme Court, and the Ethics Ordinance may be applied only to the extent it does not conflict with that Court's decisions. Therefore, in light of *Vrdolyak*, City Council members who are lawyers, as lawyer-legislators, may not represent City employees in Worker's Compensation actions against the City."

¹¹ See https://www.iardc.org/rd_database/rulesdecisions.html.

Alderman Cahnman, an attorney engaged in private practice in Springfield, represented more than a dozen defendants charged with traffic and criminal violations in Sangamon County Circuit Court while serving as a Springfield alderman. In each case, Springfield Police Department officers were the arresting or citation-issuing officers. The violations at issue included a variety of charges, mostly traffic- or retail theft-related.

The Review Board analyzed the case under RPC Rule 1.7. That Rule, as noted above, prohibits a lawyer from representing a client if "there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client or third person or by a personal interest of the lawyer." Drawing upon the Illinois Supreme Court's reasoning in an earlier case, *In re LaPinska*,¹² the Review Board stated that a "conflict arises when an attorney's independent judgment on behalf of a client may be affected by loyalty to another party." The Review Board also recognized that a violation of Rule 1.7 does *not* require a showing that a lawyer's judgment was *in fact* compromised, only that it *might* be compromised. It stated:

"the key inquiry in determining whether a conflict of interest exists is whether there is a potential for diverging interests ... [and] it seems inescapable that when an alderman represents defendants in cases where police officers from the city he serves are arresting officers, there is always a potential for diverging interests."¹³

The Review Board explained that, if a city police officer is a witness for the prosecution, the alderman-attorney, as defense counsel, may well need to cross-examine that officer, or others, even though the city itself is not a party (criminal complaints are typically brought by State's Attorneys in the name of the People of Illinois):

"He [the alderman-attorney] thus has a choice to make – assail the police officer's actions [and/or testimony] and thereby potentially do harm to the city, or go easy on the police officer and thereby fail to be an uncompromising advocate for his client. That is an untenable situation for an attorney-alderman to place himself in vis a vis his client ..."¹⁴

Accordingly, it determined that Cahnman, as attorney *and* as alderman:

"owed his undivided fidelity and a fiduciary duty to both his clients and the City of Springfield. We agree ... that [he] had a concurrent conflict, in that he operated under two divided and conflicting loyalties – one to the City for which he was alderman, and one to his client ... in the cases in which [the client] was arrested or issued citations by Springfield police officers. We believe that the circumstances here require a finding that [he] violated Rule 1.7."¹⁵

The Review Board also relied on the Illinois Supreme Court's 1990 decision in *In re Vrdolyak*.¹⁶ In that case, the Illinois Supreme Court held that, as an alderman, Vrdolyak owed "his undivided loyalty and a fiduciary duty to the City."¹⁷ It advised generally that "a lawyer-legislator should anticipate possible conflicts of interest when accepting employment and guard against them."¹⁸ And, it cautioned:

¹² 72 Ill. 2d 461, 470, 381 N.E.2d 700 (1978).

¹³ A.R.D.C. Review Board Case 2014PR00102, pp. 10, 15 (2016).

¹⁴ *Id.*, at pp.15-16.

¹⁵ *Id.*, at pp. 10-11.

¹⁶ 137 Ill. 407, 422, 560 N.E.2d 840 (1990). There, as noted above, the Court censured then-Alderman Vrdolyak for representing City employees in workers' compensation claims against the City while an alderman.

¹⁷ *Id.*, 137 Ill.2d at 419.

¹⁸ *Id.* 137 Ill.2d at 423 (citations omitted).

"If we are to maintain public confidence in our system of government and the legal profession, attorneys who serve as public officials must avoid not only direct conflicts of interests, but also any situation which might appear to involve a conflict of interest."¹⁹

Our research shows that other attorney regulatory bodies that have addressed this issue also prohibit their lawyer-legislators from representing clients in criminal actions involving police personnel from the government entity to which they are elected.²⁰

Thus, we take notice that, as a matter of Illinois law, Chicago aldermen are prohibited by the RPC from representing clients in criminal matters involving personnel from the CPD, because such representation places the aldermen in a conflict of interests between those duties they owe to their clients and those they owe to the city for which they serve as elected officials.

IV. Conclusions and Determination

As set forth above, the Board concludes that: (i) aldermen owe an undivided fiduciary duty to the City of Chicago; (ii) similarly, aldermen-attorneys owe an undivided fiduciary duty to their clients; (iii) aldermen-attorneys are therefore placed in an untenable position when they represent clients in criminal matters involving CPD, as their concurrent fiduciary duties are in conflict; and (iv) such conflicts result in the erosion of public confidence both in the legal profession and in government; and thus (v) when aldermen also act as private attorneys in criminal matters that involve the CPD, they will unavoidably face a conflict between their duties to the City of Chicago and to their private legal clients, which is prohibited by both the Ethics Ordinance's fiduciary duty provision, §2-156-020, and by Rule 1.7 of the Illinois Rules of Professional Conduct for Attorneys.

The Board therefore determines that City of Chicago aldermen who are licensed attorneys are prohibited by their fiduciary duty to the City (under the City's Governmental Ethics Ordinance) from personally representing, or receiving or deriving compensation or anything else of value from the representation by others, of persons in traffic or criminal cases in which there is participation by Chicago Police Department ("CPD") personnel, as, for example, arresting officers, executors of search warrants, investigators, witnesses, or custodians of evidence.²¹

Our determination does not prohibit aldermen from practicing criminal law, so long as *CPD personnel have no involvement in the case, as, for example, arresting officers, executors of search warrants, custodians of evidence, or witnesses*. Similarly, our determination does not prohibit law partners or associates of City elected officials from representing clients in criminal actions even if CPD personnel were involved in the case, provided the City elected official and the law firm enter into and observe an impermeable screening arrangement whereby the City elected official does not participate in the case in any way or receive any income, compensation, or other thing of value from the matter, including substitute payments.²²

¹⁹ *Id.* 137 Ill.2d at 424-425, citing *Higgins v. Advisory Committee on Professional Ethics*, 73 N.J. 123, 125, 373 A.2d 372, 373 (1977) (New Jersey Supreme Court affirmed a lower court's opinion that a member of a board of chosen freeholders (similar to a county board in Illinois) who is an attorney may not represent a criminal defendant indicted for a crime in the county in which the freeholder-attorney holds office).

²⁰ See e.g. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Opinion 96-6, August 9, 1996 ("It is improper under the Ohio Code of Professional Responsibility for a lawyer to represent, privately or by court appointment, criminal defendants in municipal court while serving as a city council person for the municipality, because such representation creates an appearance of impropriety and may appear to place personal or professional interests in conflict with official duties. Such representation is particularly inappropriate when the criminal defendant has been investigated or arrested by a police officer where the attorney serves."); Michigan State Bar Opinion CI-1137, April 2, 1986 ("[A] lawyer who is a city council member of a municipality must refrain from defending in any court persons accused of crimes where police officers of that city are the prosecuting officers or complaining witnesses." The opinion cited the concern that an attorney-alderman "will not be able to preserve the appearance of undivided loyalty and avoid any appearance of conflict if the lawyer represents the client"); and Iowa S. Ct. Board of Professional Ethics and Conduct Opinion No. 04-10, June 8, 2004 (it is improper for a city council member to represent a criminal defendant charged under state law if city police officers are involved in the arrest and may be called as witnesses). The Review Board's *Cahnman* opinion cites other cases as well.

²¹ Our opinion addresses only whether City elected officials can represent individuals in criminal cases where the CPD is involved. We note, but do not address here, that the standards are different for appointed officials – the test for them is whether the representation in a criminal or judicial, quasi-judicial or administrative proceeding is "wholly unrelated" to their work as a City board or commission member. We also do not address the question answered by our New York City colleagues: whether City employees may engage in this type of law practice. Those questions are not before the Board in this case.

²² See Case No. 18007.A, pp. 8-9.

In light of our determination, we advise that, *if* Alderman X currently represents clients in criminal matters where CPD officers are involved, as, for example, arresting officers, executors of search warrants, custodians of evidence, or witnesses, he withdraw his representation from such cases as soon as practicable, and, consistent with his obligations under the RPC, assist his clients in finding suitable counsel to take over the matters.

V. Penalties for Violating the Ordinance's Fiduciary Duty Provision

The penalties for being found to have violated the Ordinance's fiduciary duty provision are severe: violators shall be subject to a fine of not less than \$1,000 and not more than \$5,000 for each offense (per §2-156-465(b)(7), as amended, effective September 28, 2019). Moreover, being found in violation of the City's Governmental Ethics Ordinance for this type of practice could invite scrutiny and potential enforcement action from the ARDC.

VI. Reliance

The Board's determinations and advice are based solely on the application of Illinois law and the Governmental Ethics Ordinance to the question presented. This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered. *Because many issues surrounding the outside practice of law by elected officials are fact-specific, we urge City elected officials to seek confidential guidance from Board staff with questions they may have.*

The Board appreciates the opportunity to advise you, and your professionalism in seeking our advice on this and prior occasions. If you have further questions about this or any other matter, please contact the Board's legal staff.



William F. Conlon
Board Chair